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November 18, 2004

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551
Regs.comments@federalreserve.gov

RE: Docket No. R-1210 – Proposed Rule and Official Staff Commentary of Regulation E – Comments of Capital One Financial Corporation

Dear Ms. Johnson:

Capital One Financial Corporation ("Capital One") appreciates the opportunity to comment on the proposal by the Board of Governors of the Federal Reserve System (the "Board") to amend provisions of Regulation E and its Official Staff Commentary.

Headquartered in McLean, Virginia, Capital One Financial Corporation (http://www.capitalone.com) is a holding company whose principal subsidiaries, Capital One Bank and Capital One, F.S.B., offer consumer lending and deposit products and Capital One Auto Finance, Inc., offers automobile and other motor vehicle financing products. Capital One's subsidiaries collectively had 47.2 million accounts and $75.5 billion in managed loans outstanding as of September 30, 2004. Capital One, a Fortune 500 company, is one of the largest providers of MasterCard and Visa credit cards in the world. Capital One trades on the New York Stock Exchange under the symbol "COF" and is included in the S&P 500 index.

Section 205.2(b) – Definition of Account to Include Payroll Accounts.

We support the Board's proposal to provide that a "payroll card account," as defined, is an "account" covered by Regulation E. As stated in the section-by-section analysis, payroll cards are assigned to an identifiable consumer, represent a stream of payments to that consumer, are replenished on a recurring basis, and can be used in various locations for various purposes via the same instrumentalities as other EFT services. We also agree that the proposal should be limited to payroll card accounts only

and that the proposed definition appropriately tracks crucial elements of the accounts such as the source of funds and the recurring nature of transfers.

We do not believe that Regulation E coverage should depend on whether the accounts qualify as eligible "deposits" for purposes of section 3(l) of the Federal Deposit Insurance Act. Stored value systems are difficult to categorize in every case. The structure and operations of various payroll and other stored value systems are often unique and complex with varying levels of benefits and risks for consumers.

As a result, we believe that each regulatory scheme should independently balance the needs of consumers and issuers in connection with any future regulation of payroll cards and other stored value systems. Any attempt to globally link regulation of these important and emerging payment systems could result in an inappropriate balancing of competing interests. The Board should make it clear that the definition under regulation E does not affect the coverage of payroll cards under other regulations.

Section 205.3 – Electronic Check Conversion.

Clarifying the coverage of ECK transactions provides desirable regulatory certainty.

We support the Board's proposal to clarify the coverage of electronic check conversion ("ECK") transactions by moving the provision from the Commentary to the Regulation. We also support the language change from "completes the transaction" to "goes forward with the transaction." That language removes ambiguity about when a check transaction is complete and places the distinction appropriately on the consumer's immediate action, which is reasonable for determining authorization.

Model Clauses provide needed guidance to EFT participants regarding one-time transactions.

We strongly support the Board's proposal to provide a model clause for authorizing a one-time EFT using information from a check. The safe harbor provided by model clauses will benefit consumers by encouraging consistency in disclosure.

We strongly favor the notice proposed as Model Clause A-6 (a), and we urge that, in the event that the final Regulation attaches multiple alternative clauses, the version currently identified as A-6(a) continue to be listed first. In response to the Board's request for comment as to whether this version of notice will harm consumers, we are quite confident that this disclosure, in which a consumer authorizes an EFT or in the alternative a check transaction, will *not* result in harm to consumers, and on the contrary that it will be the most beneficial to consumers because it focuses on the elements that are of most importance to them. The Board has indicated, based on consumer correspondence, that the elements important to consumers are potential speed of processing and non-return of checks. If these are the issues that are important to consumers, Model Clause A-6 (a) keeps the focus in the right place.

We believe that the optional notices – A-6(b) and A-6(c) – are impractical. While notice A-6(b) has the virtue of simplicity, it is unlikely that any payee will be able to commit to convert *all* payments which consumers believe to be checks to Electronic Checks. Hence the notice will be insufficient or overly inflexible as soon as the payee receives an ineligible item.

We believe that notice A-6(c) is also impractical because of the diversity and arcane nature of circumstances in which ECK is infeasible. If payees were required to include the circumstances, they would feel compelled to provide an exhaustive list of circumstances which are common in the industry but unfamiliar to consumers. These more comprehensive disclosures would potentially overwhelm consumers with explanations of negotiable instruments, MICR coding, "on us" and local checks, administrative returns, money orders, convenience checks, and other distinctions that are likely not meaningful to consumer decision-making. Systems downtime, damaged checks, workforce changes, and other temporary operational challenges to check conversion could also be relevant to the processing of a particular item, but difficult to forecast in a brief notice. The physical space required to give this type of information in a monthly statement would likely make the option of using proposed model clause A-6(c) cost-prohibitive and unattractive, and the information that would be provided if the disclosure of circumstances were to be required would not provide value to consumers.

For these reasons we encourage the Board to retain notice A-6(a).

ECK involves operational complexities that may need further coverage in the Regulation.

We support the work of the Federal Reserve in clarifying a number of operational complexities surrounding electronic check conversion. There are three additional items that we think the final Regulation should specifically address.

First, the Regulation should acknowledge that a single ECK disclosure is sufficient for purposes of resubmission of the same payment which is returned to the payee as unpaid. In short, a single ECK disclosure satisfies the Regulation for all submissions of the same payment as otherwise permitted by law.

Second, the Regulation should clarify that the ECK disclosure may be combined with other disclosures, terms and conditions, or communications sent to the consumer provided the ECK disclosure remains clear and conspicuous, and that such ECK disclosures are effective when mailed to the last known address of the consumer indicated on the biller's records.

Finally, we request that the FRB make clear that an ECK disclosure made prior to the check conversion can satisfy the clear-and-conspicuous requirements of the Regulation without being contemporaneous with the submission of the payment. Many billers have large numbers of customers with whom they have no regular contact either through a periodic statement/billing medium or otherwise and may not receive a future payment from the consumer for months or, perhaps, years. Since the biller does not

control the timing of the submission of the payment for these consumers, the Regulation should expressly provide that disclosure for ECK made prior to submission of the item that is otherwise clear and conspicuous satisfies the requirements of the Regulation.

The NACHA rule on written consent at POS provides appropriate consumer protections.

The Section-by-Section Analysis indicates that comment is solicited on whether merchants or other payees should be required to obtain the consumer's written signed authorization to convert checks received at POS. We believe that the current requirements of the NACHA rules as outlined in footnote 6 to the Section-by-Section Analysis provide appropriate consumer protections.

An important distinction between a consumer submitting a check at POS and a consumer remitting a check to billers is the extent of the consumer's relationship with the payee. With respect to billers, consumers typically have an established and ongoing relationship that provides predictability regarding the payment remittance process including the opportunity to opt out of the check conversion process under the NACHA Rules. For POS transactions, the consumer may have little experience with the merchant or its remittance processes and no meaningful opt out opportunity.

Consumer awareness and understanding are critical elements of the ECK process as evidenced by the proposed amendments. A signed authorization at POS will continue to provide assurance of consumer understanding and agreement, discourage fraud and increase the credibility and consumer confidence in the check conversion process. Therefore, we believe that the uniform standard of authorization as currently provided in the NACHA Rules for POS transactions is the appropriate approach to protecting consumers in this context.

Section 205.10(d) – Notice of Transfers Varying in Amount.

Section 205.10(d) requires a bank or payee to send a written notice at least 10 days in advance of any recurring preauthorized transfer that differs from the previous or contracted amount. Current law provides an option for consumers to choose to receive notice only if the transfer falls outside of a specified range and also provides a complete exclusion from coverage where the accounts belong to the same consumer and are held at the same institution. (Sections 205.10(d) and 205.3(c) In the case of CD accounts, interest transferred on a regular basis to another account of the same consumer might vary based on the number of days in the period, but might not be kept within one institution. In order to provide flexibility, the Board has proposed a comment that a bank may provide a consumer with notice of a reasonable range of amounts anticipated (and pre-authorized) to be transferred between the consumers' accounts at different financial institutions. We strongly support this clarification as proposed.

Section 205.11 – Procedures for Resolving Errors.

We agree generally with the Board's proposed clarification of the commentary to Section 205.11. In light of the increased variety of EFT transaction types, information relevant to an assertion of error is likely to be outside the payment instructions but within the "four walls" of the institutions' records. To facilitate institutions' compliance with this requirement, we would prefer that the Regulation state the requirement to be for a "reasonable" investigation, combined with examples of appropriate steps, such as additional language to indicate that a reasonable investigation could consist of an examination of the institution's records for the account in question, and not all accounts at the financial institution. The Official Commentary section 226.12(b)-3 of Regulation Z could serve as an appropriate analogy in drafting the final rule. Guidance on appropriate investigations would be more helpful in the long run than a one-size-fits-all prescription.

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We appreciate the opportunity to respond to the Board's proposal. If you have any questions about this letter, please contact me at (703)720-2255.

Sincerely,

/s/ Christopher T. Curtis

Christopher T. Curtis
Associate General Counsel, Policy Affairs
Capital One Financial Corporation

CTC/slv